88-1256

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

BENNY PELLIGRA,
Petitioner,

vs.

GOODYEAR TIRE & RUBBER COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Court of Appeals of Ohio
For the Ninth Appellate District

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I.

QUESTIONS PRESENTED

1. Whether the state appellate court has impermissibly broadened the scope of the preemption provision of 29 U.S.C. Section 1144(a) when it holds that a state claim challenge to a one-time, lump-sum separation payment, characterized by the court as a "retirement incentive plan," is preempted by ERISA because the "retirement incentive plan," while possibly not covered by ERISA itself, is "related to" a retirement and pension plan that is covered by ERISA, because it "create[s] additional burdens" on the covered plan.

2. Whether a one-time, lump-sum separation payment, voluntarily offered by the company as an inducement for early retirement, is a covered employee benefit "plan" requiring preemption of any state claim challenge to it under 29 U.S.C. Section 1144(A).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No._____

BENNY PELLIGRA,
Petitioner,

vs.

GOODYEAR TIRE & RUBBER COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF OHIO
FOR THE NINTH APPELLATE DISTRICT

The petitioner Benny Pelligra respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of Ohio for the Ninth Appellate District entered in this proceeding on June 29, 1988.

OPINION BELOW

The opinion of the Court of Appeals of Ohio, Ninth Appellate District, unreported, appears in the Appendix hereto. Also included in the Appendix is the Judgment of the Summit County Court of Common Pleas entered after a jury verdict in favor of petitioner, from which the appeal was taken. No opinion was rendered by the Supreme Court of Ohio, which overruled a motion to certify the record.

JURISDICTION

The judgment of the Court of Appeals of Ohio, Ninth Appellate District, was entered on June 29, 1988, reversing a jury verdict for Petitioner entered December 16, 1987. The Supreme Court of Ohio, in its discretion pursuant to article IV, Section 2(B)(2)(d) of the Constitution of Ohio, overruled a motion to certify the record on October 26, 1988, and this petition for a writ of certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under U.S.C. Section 1257(3).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

Section 1144(a) Supersedure; effective date

Except as provided in Subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

STATEMENT OF THE CASE

Petitioner Benny Pelligra had worked for the Goodyear Tire & Rubber Co. for nearly 40 years, most of it in its International Division, when he made known his plans to retire. His supervisors were aware of Mr. Pelligra's intentions, at the latest, by the Fall of 1984. His replacement had been hired and trained by May, 1985.

Just prior to submitting his formal application for pension, Mr. Pelligra had been in Australia on company business for about two weeks. Upon his return, he heard a rumor that Goodyear was considering "some type of incentive for retirement." On May 14 or 15, 1985, he phoned Terry Deems, Manager of Compensation, Benefits & Personnel Policy, to inquire if the rumors were true. According to Mr. Pelligra, when Mr. Deems was asked if there was "anything in the works," he replied, "Well, not that I know of." The evidence at trial showed, however, that Mr. Deems in fact had been asked to prepare recommendations for a potential separation program and had submitted three separate options for consideration by Goodyear management.

On the basis of what he considered to be assurances that no retirement incentive offers would be forthcoming, Mr. Pelligra signed his application for pension on May 16, 1985. On May 17, 1985, a special separation allowance was announced by Goodyear President Tom Barrett in a letter to salaried employees. The letter advised those interested in more information to contact Terry Deems. Because Mr. Pelligra had already signed his application for pension, the company refused to consider him for the special separation allowance. The special separation allowance would have amounted to $55,700 for Mr. Pelligra.

Mr. Pelligra filed an action for breach of contract, negligent misrepresentation and fraud in the Court of Common Pleas of Summit County, Ohio in January 1986. In December 1986, the company moved for summary judgment, claiming *inter alia* that the matter was governed by ERISA, to the exclusion of all state law causes of action. The motion was denied January 8, 1987. A motion to reconsider on the basis of newly released decisions of this Court concerning ERISA preemption was filed June 4, 1987. This motion was also denied.

The matter proceeded to jury trial on December 7, 1987. At the close of Plaintiff's case, Defendants moved to arrest the case from the jury, again on the basis of an ERISA preemption argument, and for a directed verdict on the common law issues. The motions were overruled. At the close of all the evidence, Defendants renewed the motion for directed verdict, including in its argument the ERISA preemption provision. The trial court overruled all aspects of the motion except that a directed verdict as to the breach of contract claim was granted.

The jury returned a verdict in favor of Mr. Pelligra on the negligent misrepresentation claim in the amount of $55,700. Judgment was entered upon the verdict on December 16, 1987.

Upon appeal by Goodyear, that judgment was reversed by the Court of Appeals of Ohio, Ninth Appellate District. The sole basis of the appellate court's decision was that ERISA preempted the common-law claims. Three other assignments of error as to the merits on the common-law issues were dismissed as moot.

In response to Petitioner's argument that the one-time lump-sum separation payment, which was offered to induce early retirements, was not a "plan," but merely a "benefit" that did not merit ERISA preemption, the appellate court said:

> "In the instant case, the retirement incentive plan was clearly related to an ERISA plan. It is clear from the record that Goodyear's retirement and pension program is covered by ERISA. Even if the retirement incentive plan is not in and of itself covered by ERISA, it most certainly relates to Goodyear's retirement and pension program. Thus, Goodyear's retirement and [sic] incentive plan relates to a plan covered by ERISA and therefore state causes of action concerning Goodyear's retirement incentive plan are preempted by ERISA."

See Appendix hereto.

In short, the appellate court held that a state claim challenging a separation payment is subject to ERISA preemption, if it can be said that the payment program in question "relates to" a covered ERISA "plan," even though the payment program may be simply a "benefit" and not an employee benefit "plan."

REASON FOR GRANTING THE WRIT

1. AN IMPORTANT QUESTION OF FEDERAL LAW, WHICH SHOULD BE SETTLED BY THIS COURT, HAS BEEN DECIDED BY THE STATE COURT OF APPEALS IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

The state appellate court erred in two respects: (1) It impermissibly extended the preemption provision of 29 U.S.C. Section 1144(a) to allow preemption where the program being challenged under the state claim may be merely a "benefit," and not an employee benefit "plan"; and (2) It failed to properly identify the nature of the one-time, lump-sum separation benefit, which the company had offered as an inducement for early retirement.

The court's failure to identify the nature of the payment in question as a "benefit" conflicts at least in principle with the holding of *Fort Halifax Packing Co., Inc. v. Coyne* (1987), _____ U.S. _____, 107 S. Ct. 2211, 96 L. Ed. 2d 1. More serious, however is the implication in the court's decision that any kind of program or benefit will be immune to state challenge if it can be said that the program or benefit in question is related to an ERISA plan.

The Act clearly requires that it must be the state law or claim that must be "related to" an employee benefit plan in order for preemption to apply. The appellate court's decision has created an open-ended preemption provision that will permit preemption and preclude state claims challenging any type of program or benefit where it can be said that the program or benefit has a relationship to an employee benefit plan, regardless of the nature of the benefit being challenged. The

appellate court's decision makes a mockery of the "relationship to the plan" test incorporated into ERISA by Congress and consistently recognized by this Court. *Fort Halifax Packing Co., Inc. v. Coyne, supra; Pilot Life Insurance Co. v. Dedeaux* (1987), _____ U.S. _____, 107 S. Ct. 1549, 95 L. Ed. 2d 39; *Metropolitan Life Ins. Co. v. Taylor* (1987), 481 U.S. 58, 107 S. Ct. 1542, 95 L. Ed. 2d 55; *Shaw v. Delta Air Lines, Inc.* (1983), 463 U.S. 85. The appellate court decision conflicts with the plain meaning of the statute, as well as the policy underlying the Act, and this Court's rulings construing the test.

The question of when a state law or common-law claim is preempted by ERISA has generated considerable confusion. The extent of the preemption provision has been the subject to much litigation. For this reason, it is important that this Court act expeditiously to delineate the parameters of ERISA's preemption clause.

ERISA is a remedial statute designed to regulate the creation and administration of employee welfare benefit plans. While the term "employee welfare benefit plan" is defined in the Act as any plan, fund or program maintained for the purpose of providing employees with a wide spectrum of benefits such as pension, medical, accident, disability, death, unemployment, or vacation benefits [29 U.S.C. Section 1002(1)], the question of what actually constitutes a plan remains unsettled.

Certainly, Congress, in undertaking to regulate the field of employee benefit plans, intended to protect employers from conflicting or inconsistent State and local regulations, as well as to protect the interests of employees in obtaining vesting benefits under established pension and welfare plans. The express preemption provisions of ERISA have been recognized

by this court as "deliberately expansive, and designed to 'establish pension plan regulation as exclusively a federal concern.' " *Pilot Life Insur. Co. v. Dedeaux* (1987), 107 S. Ct. 1549, citing *Alessi v. Raybestos Manhattan, Inc.* (1981), 451 U.S. 504, 523.

Nonetheless, courts are bound by the plain language of the Act when asked to apply the preemption clause, and the Act clearly provides that a state law or claim will be preempted when it relates to an employee benefit plan, not when it relates to something that in turn is related to the plan. The body of the case law interpreting the 'relate to' language of the clause is consistent in applying it thus. For example, in *Shaw v. Delta Airlines, supra*, this Court said "a state law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a *plan*." *Id.*, 463 U.S. at 96-97. (Emphasis added.)

There's good reason why the Act requires the state law or claim to be related to a "plan" in order for the preemption clause to apply. ERISA was enacted to require disclosure and to provide safeguards with respect to the establishment, operations and administration of employee benefit plans; to prevent abuses of the special responsibilities borne by those dealing with the plans; and to prevent self-dealing, imprudent investing, and misappropriation of plan funds. The focus of the statute is on the administrative integrity of benefit plans. Only "plans" involve administrative activity potentially subject to employer abuse. *Fort Halifax Packing Co., Inc. v. Coyne, supra*, at 2219-2220. These controls aren't necessary if no administrative activity is involved. A one-time benefit is not a plan; no administrative activity is required. Yet, the state, as it did in *Fort Halifax Packing Co., Inc. v. Coyne, supra*, may have an interest in regulating that benefit; the state may have an interest

in permitting a common-law claim where some possible injustice has occurred to one of its citizens. The preemption purpose of ERISA to establish a uniform set of regulations governing employee benefit plans, so that employers are not forced to administer plans differently in each state in which they have employees, is not infringed by allowing a common-law claim under these circumstances.

> "*** Congress intended preemption to afford employers the advantages of a uniform set of administrative procedures governed by a single set of regulations. This concern only arises, however, with respect to benefits whose provision by nature requires an on-going administrative program to meet the employer's obligation. It is for this reason that Congress preempted state laws relating to *plans*, rather than simply to *benefits*. Only a plan embodies a set of administrative practices vulnerable to the burden that would be imposed by a patchwork scheme of regulation." (Emphasis in original.) *Id.*, at 2217.

In *Fort Halifax Packing Co., Inc. v. Coyne, supra,* this Court made it clear that while the preemptive effect of the clause is broad, it is not all-encompassing. *Fort Halifax* involved a state statute that required companies to provide a one-time severance payment to employees in the event of a plant closing. The company argued that any state law pertaining to a type of employee benefit covered by ERISA necessarily regulated the employee benefit plan, and therefore must be preempted.

The court, however, refused to read the word "plan" out of the Act.

> "*** The words 'benefit' and 'plan' are used separately throughout ERISA, and no where in the statute are they treated as the equivalent of one another. Given the basic difference between a

> 'benefit' and a 'plan,' Congress' choice of language is significant in its preemption of only the latter." *Id.*, at 2216.

The preemption clause expressly states that state laws are superseded to the extent that they relate to any employee benefit "*plan.*" ERISA does not preclude all state legislation or claims concerning employee *benefits.*

It is petitioner's contention that the separation payment offered by the company here was a "benefit" under the holding of *Fort Halifax Packing Co. v. Coyne, supra.* There really is no difference between the severance benefit in *Fort Halifax* and the separation benefit offered in this case. Both were one-time events. Neither required an on-going administrative scheme, such as is envisioned by or subject to ERISA.

This Court found that the Maine statute did not establish a plan, nor require an employer to maintain a plan. The one-time, lump-sum payment triggered by a single event required "no administrative scheme whatsoever."

The same is true here. What Goodyear did essentially was to offer a "buy-out." This was admittedly a retirement inducement program. The company was faced with a need to cut costs. A good way to eliminate people is through early retirement. Terry Deems in the Personnel Department was asked to research the possibilities and to make recommendations.

The company points to the fact that courts have found the payment of severance benefits to be "plans," in a number of cases. See, *Blakeman v. Mead Containers* (CA 6, 1985), 779 F.2d 1146; *Holland v. Burlington Industries* (CA 4, 1985), 772 F.2d 1140, *aff'd* 91 L. Ed. 2d 559 (1986); *Gilbert v. Burlington Industries* (CA 2, 1985), 765 F.2d 320, *aff'd* 91 L. Ed. 2d 558 (1986);

Ridens v. Voluntary Separation Program (D.C. Minn. 1985), 610 F. Supp. 770. Petitioner recognizes that severance benefits may be and often are provided through an employee benefit "plan." Where a company has an announced policy of providing such benefits upon the involuntary termination of its employees, where that policy is spelled out in handbooks and manuals, where such "benefits" are perhaps even contracted for in negotiations with the employees, a court may certainly conclude that they should be viewed as "plans."

But there is a difference between those types of severance payments and the kind of separation program that was offered here for a limited time to a limited number of employees. Severance as a rule is an incentive for an employee to remain in the employment of the company. It is an incentive for the employee to be loyal and industrious. Where it has been paid in the past, over a number of years, there is an expectation of continuing payments. The company knows there is an expectation and must plan for the expenditures the plan will generate. There is also a potential for abuse, which suggests a need for ERISA control. *Scott v. Gulf Oil Corp.* (CA 9, 1985), 754 F.2d 1499. Under these circumstances, it can be readily understood how courts could find that they are "plans" and that state laws or claims relating to them must be preempted.

Such is not the case here. This was a one-time buy-out. No one was advised of it in advance. The purpose was to cut costs by reducing the payroll. The intent was to achieve this goal with the least amount of disturbance among employees. This way, no one would be forced to leave; only those considering retirement anyway would be likely to respond to the offer. By having a personnel employee research the possibilities, the company could gain some insight into the probable cost of this offer. It

could plan for the financial expenditure. The offer would be good for only a limited time. This was to be a one-time, lump-sum payment—no administrative scheme was required. As soon as the payment was made, it was over. To this extent, the separation offer here is comparable to the statutorily required severance payment of *Fort Halifax Packing Co., Inc. v. Coyne, supra.*

The argument was made to the appellate court that *Fort Halifax* should lead to a conclusion that the separation payment was a "benefit," not a "plan." The court, while describing the separation program as a "retirement inducement plan," never directly addressed the distinction. Instead, the court concluded:

> "Even if the retirement incentive plan is *not* in and of itself covered by ERISA, it most certainly *relates to* Goodyear's retirement and pension plan. ***" (Emphasis added).

The court then went on to say that since this retirement and pension plan would create additional burdens on the company's retirement and pension program (although there was no evidence that such would be the case), the incentive plan related to the ERISA plan. On this basis, the court held the state claims preempted.

The decision is clearly wrong—not only because it ignores the guidelines of *Fort Halifax* in determining whether or not the separation payments here constituted a "benefit" or a "plan," but also because the court has overreached the scope of ERISA. In the face of this Court's pronouncement of limitations on the preemption clause, this decision has extended preemption to all state claims involving anything that "relates to" a "plan," including a "benefit."

Under the court's holding, the preemption clause now says: ERISA preempts all state laws relating to a benefit when that benefit in turn relates to an employee benefit plan—even if that benefit is not part of a plan; even if ERISA doesn't cover that benefit (because it is not part of a plan); and even though ERISA gives absolutely no remedies and imposes no obligation with respect to such benefit (since ERISA governs plans, not benefits).

The decision leaves an employee, such as Benny Pelligra here, virtually without any remedies. If state law is preempted, the fact is, federal law doesn't apply either. ERISA's rights, duties, and liabilities are concerned with plans. ERISA's reporting and disclosure requirements are concerned with plans. The fiduciary duties of an administrator under ERISA arise solely in relation to plans. If the criterion for preemption is whether or not a benefit "relates to" a plan, or whether or not something "creates additional burdens on" a plan, there may be no logical limit to preemption. Congress never intended to displace state remedies for benefits not part of a covered plan.

This is an important case because it involves a very broad preemption statute that has caused the courts no little difficulty. The goal of ERISA was to enhance, not diminish, the security of employees in their retirement income and other benefits. If the act is not read and applied with care, the result will be exactly the opposite.

CONCLUSION

Fluctuations in the national economy in recent years have made "buy-outs" a common practice in industry. Because a lack of clarity in this area of the law can leave a large number of persons with absolutely no remedy at all—either under state or federal law—this court should grant this petition. A writ of certiorari should issue to review the decision of the Court of Appeals of Ohio for the Ninth Appellate District.

Respectfully submitted,

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APPENDIX

DECISION AND JOURNAL ENTRY OF THE COURT OF APPEALS NINTH APPELLATE DISTRICT OF OHIO

(Dated June 29, 1988)

C.A. No. 13470

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

BENNY PELLIGRA,
Plaintiff-Appellee,

v.

GOODYEAR TIRE & RUBBER CO., *et al.*,
Defendants-Appellants.

APPEAL FROM JUDGMENT ENTERED IN THE
COMMON PLEAS COURT
COUNTY OF SUMMIT, OHIO
CASE NO. CV 86 1 0324

DECISION AND JOURNAL ENTRY

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

MAHONEY, *P. J.*

Appellant, The Goodyear Tire & Rubber Co. (Goodyear), appeals from the judgment of the Summit County Court of Common Pleas in favor of appellee, Benny Pelligra, following a jury trial. We reverse.

FACTS

Benny Pelligra was an employee at Goodyear for over forty years. In the months prior to May, 1985, Pelligra had been considering retirement. On Sunday, May 12, 1985, Pelligra returned from an overseas trip. Upon his return, Pelligra heard rumors that Goodyear was considering an incentive plan to induce salaried Goodyear workers to retire. Consequently, Pelligra called Terry Deems, who worked in the compensation benefits and personnel proposals department, to ascertain whether there was any truth to the rumors. Pelligra claimed that as a result of this conversation that Deems had given Pelligra the false impression that there was "nothing in the works." Pelligra further claimed that in reliance on Deems' representations he signed his retirement papers on May 16, 1985. On May 17, 1985, Goodyear announced a retirement incentive plan. Since Pelligra had signed his retirement papers one day too soon, he was prohibited from participating in the plan. If Pelligra had participated in the plan he would have been entitled to one year's salary upon retirement.

Pelligra sued Goodyear to recover the one year's salary he would have received pursuant to the retirement incentive plan under the theories of breach of contract, intentional misrepresentation, and negligent misrepresentation. The trial court disagreed with Goodyear's assertion that Pelligra's causes of action were pre-empted by federal law. At trial, the trial court directed a verdict in favor of Goodyear with respect to the breach of contract claim. The jury rendered a verdict in favor of Goodyear on the intentional misrepresentation claim and in favor of Pelligra on the negligent misrepresentation claim. This appeal followed.

ASSIGNMENT OF ERROR I

> "The trial court erred, to the prejudice of the defendant, by overruling defendant's motions for summary judgment on the issue of ERISA preemption and by failing, at trial, to direct a verdict in favor of defendant on the plaintiff's common law claims of breach of contract, fraud and negligent misrepresentation."

The Employee Retirement Security Act (ERISA), Section 1001 *et seq.*, Title 29, U.S. Code, is a comprehensive statutory scheme to regulate pension and retirement benefits. *Firestone Tire & Rubber Co. v. Neusser* (C.A. 6, 1987), 810 F. 2d 550. Furthermore, ERISA pre-empts state laws that relate to retirement plans. Section 1144(a), Title 29, U.S. Code provides:

> "Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 USCS Section 1003(a)] and not exempt under section 4(b) [29 USCS Section 1003(b)].***."

Furthermore, the United States Supreme Court approved the United States Solicitor General's argument that:

> "*** Congress clearly expressed an intent that the civil enforcement provisions of ERISA Section 502(a) be the exclusive vehicle for actions by ERISA-plan participants and beneficiaries asserting improper processing of a claim for benefits, and that varying state causes of action for claims within the scope of Section 502(a) would pose an obstacle to the purposes and objectives of Congress.***."

Pilot Life Ins. Co. v. Dedeaux (1987), 95 L. Ed. 2d 39, 50-51.

Additionally, our own Supreme Court has held that:

"***.

"A state common-law claim asserting express, willful and malicious misrepresentation against a self-insured employee benefit plan is pre-empted by ERISA."

Richland Hospital, Inc. v. Ralyon (1987), 33 Ohio St. 3d 87, paragraph five of the syllabus. Accord *Varhola v. Doe* (C.A. 6, 1987), 820 F. 2d 809, 817; cf. *Neusser, supra.*

Accordingly, we find that Pelligra's state common law causes of action are pre-empted by ERISA.

Pelligra argues in his brief that the retirement incentive plan did not relate to an ERISA type plan but was merely an employment benefit not covered by ERISA. Pelligra likens his case to *Fort Halifax Packing Co. v. Coyne* (1987), 96 L. Ed. 2d 1. In *Fort Halifax*, Maine passed a statute where employers were required to pay employees a lump sum under certain circumstances when a plant closed. The United States Supreme Court held that any such lump sum payment was merely an employment benefit and not related to any plan covered by ERISA. Thus, state causes of action with regard to the lump sum payment were not pre-empted by ERISA.

In the instant case, the retirement incentive plan was clearly related to an ERISA plan. It is clear from the record that Goodyear's retirement and pension program is covered by ERISA. Even if the retirement incentive plan is not in and of itself covered by ERISA, it most certainly relates to Goodyear's retirement and pension plan. Since Goodyear's retirement incentive plan induces employees to retire, it would in turn create additional burdens on Goodyear's retirement and pension program. Thus, Goodyear's retirement and incentive plan

relates to a plan covered by ERISA and therefore state causes of action concerning Goodyear's retirement incentive plan are pre-empted by ERISA.

Accordingly, Goodyear's first assignment of error is sustained.

ASSIGNMENTS OF ERROR

"II. The trial court erred, to the prejudice of the defendant by not directing a verdict in favor of the defendant on the issue of negligent misrepresentation.

"III. The trial court erred, to the prejudice of the defendant, by failing to direct a verdict on the issue of defendant's duty to disclose information about a future program.

"IV. The judgment of the lower court is against the manifest weight of the evidence."

In light of our disposition of assignment of error one, we find that the remaining assignments of error are moot.

SUMMARY

Goodyear's first assignment of error is sustained and the judgment of the trial court is reversed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this court, directing the County of Summit Common Pleas Court to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellee.

Exceptions.

/s/ EDWARD J. MAHONEY
For the Court

CACIOPPO, *J.*
Concurs

GEORGE, *J.*
Concurs in Judgment Only

JUDGMENT ON JURY VERDICT OF THE SUMMIT COUNTY COURT OF COMMON PLEAS

(Filed December 16, 1987)

Case No. CV 86 1 0324

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMMIT

BENNY PELLIGRA,
Plaintiff,

vs.

GOODYEAR TIRE, *et al.*,
Defendants.

JUDGMENT ON JURY VERDICT

This action came on for trial before the Court and a jury, and the issues having been duly tried and the jury having duly rendered its verdict.

It is ORDERED and ADJUDGED that the Plaintiff, Benny Pelligra, recover of the Defendant, Goodyear Tire & Rubber Company the sum of $55,700.00 and his costs of action.

JUDGE GLEN B. MORGAN

ORDER OVERRULING MOTION FOR SUMMARY JUDGMENT OF THE SUMMIT COUNTY COURT OF COMMON PLEAS

(Filed January 8, 1987)

Case No. CV 86 1 324

Judge Morgan

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMMIT

BENNY PELLIGRA,
Plaintiff,

vs.

THE GOODYEAR TIRE & RUBBER COMPANY,

and

GOODYEAR INTERNATIONAL CORPORATION,
Defendant.

ORDER

This matter came before the Court upon Defendant's Motion for Summary Judgment. Plaintiff has not responded to the motion.

Defendant supports his motion with three (3) arguments: 1) State law is preempted by the Employee Retirement Income Security Act of 1974 (hereinafter ERISA); 2) The lack of any contractual relationship between Plaintiff and Defendant, and; 3) The lack of fraud.

Defendant argues Plaintiff's action is preempted by ERISA and hence can only be brought in Federal Courts. The Court notes it is not faced, here, with a state law claimed to be in conflict with ERISA nor is it a matter of interpreting ERISA. The action sub judice involves a voluntary program which provides a special separation allowance only where the employee is offered the opportunity to participate. Thus, the Court is faced only with deciding whether Plaintiff is entitled to participate in a voluntary program designed to streamline company operations.

Defendant contends ERISA preempts state court jurisdiction in claims against the employer for retirement income or benefits. The Court has reviewed a number of cases from around the country and found the law in this area obviously unsettled.

In some circumstances state courts have litigated claims against employers and/or trustees of a pension benefit plan covered by ERISA, even where there is a violation of the terms of the pension/benefit plan. In re: *Marriage of Campa*, 89 Cal. App. 3d 113, appeal dismissed 444 U.S. 1028. A Declaratory Judgment action to determine an employee's rights under state common law principles of contract should not be moved to Federal Court, even where it is claimed ERISA preempts all state laws relating to employee benefits. *MCI Communications Corp. v. Amato*, 587 F. Supp. 1008 (1984).

Lastly, it has been held ERISA does not preempt claims for breach of contract nor for breach of implied duties of good faith and fair dealing under state insurance laws, even where said claims involved benefit payments under a collectively, bargained for plan. *McLaughlin v. Connecticut General Life Ins. Co.*, 565 F. Supp. 434 (1983).

Thus the Court can resolve the issues, present in this action, without acting contrary to 29 U.S.C. §1144. Application of state law in the action sub judice will not violate 29 U.S.C. §1144 wherein ERISA supercedes any and all state laws, etc.

Further upon review, the Court concludes as to issues of breach of contract and of fraud there exist genuine issues of material fact which preclude the Court from sustaining Defendant's Motion for Summary Judgment pursuant to Civil Rule 56.

Upon consideration of the motion, affidavits, deposition and arguments of counsel filed herein, the Court finds Defendant's motion not well taken and hereby overrules the same.

It is so ordered.

JUDGE GLEN B. MORGAN

ORDER OVERRULING MOTION FOR RECONSIDERATION OF THE SUMMIT COUNTY COURT OF COMMON PLEAS

(Filed June 15, 1987)

Case No. CV 86 1 324

Judge Morgan

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMMIT

BENNY PELLIGRA,
Plaintiff,

vs.

THE GOODYEAR TIRE & RUBBER COMPANY, *et al.*,
Defendants.

ORDER

The Motion for Reconsideration of Defendants' Motion for Summary Judgment is overruled notwithstanding the decision of the United States Supreme Court in *Pilot Life Insurance Co. v. Dedeaux,* 55 U.S.L.W. 4471 (U. S. April 6, 1987).

This Court cannot, based upon the information before it conclude that the voluntary Special Separation Program benefits, selectively offered and voluntarily accepted by qualified employees, is an "employee benefit plan" under the Employee Retirement Income Security Act of 1974 (ERISA).

JUDGE GLEN B. MORGAN

ENTRY OF THE SUPREME COURT OF OHIO DENYING MOTION TO CERTIFY THE RECORD

(Dated October 26, 1988)

Case No. 88-1529

THE SUPREME COURT OF OHIO

COLUMBUS

BENNY PELLIGRA,
Appellant,

v.

GOODYEAR TIRE & RUBBER COMPANY, *et al.*,
Appellees.

ENTRY

Upon consideration of the motion for an order directing the Court of Appeals for Summit County to certify its record, it is ordered by the Court that said motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Scanlon & Gearinger Co., L.P.A.

/s/ THOMAS J. MOYER
Chief Justice

(2)

Supreme Court, U.S.
FILED
FEB 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1256

IN THE

Supreme Court of the United States

October Term, 1988

BENNY PELLIGRA,
Petitioner,

vs.

THE GOODYEAR TIRE & RUBBER COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF OHIO
FOR THE NINTH APPELLATE DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

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February 21, 1989

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I.

QUESTION PRESENTED

Whether the state appellate court correctly construed 29 U.S.C. §1144(a) when it held Petitioner's common law causes of action to be subject to and preempted by ERISA.

II.

28.1 STATEMENT

NAME OF EACH SUBSIDIARY OR AFFILIATE OF THE GOODYEAR TIRE & RUBBER COMPANY WHICH IS NOT WHOLLY-OWNED

Brad Ragan, Inc (North Carolina)
Hayes Construction Tire Service Inc
Sams Tire Company (Washington)
Goodyear Canada Inc (Canada)
Ascotan S.A. (Chile)
Goodyear India Limited
Goodyear Jamaica Limited
Goodyear Lastikleri Turk Anonim Sirketi
Goodyear Malaysia Berhad
Goodyear Marco, S.A.
Goodyear Taiwan Limited
Goodyear (Thailand) Limited
P.T. Goodyear Indonesia
The Goodyear Tire & Rubber Company of the Philippines
South Pacific Tyre Australia
South Pacific Tyre New Zealand
Gran Industria de Neumaticos Centroamericana, S.A. (Guatemala)
Nippon Goodyear (Japan)
Formosan Industria Rubber Products

Mindinao Rubber Company Inc (Philippines)
Zamboanga Rubber Company (Philippines)
Anlagenyerwaltungagesel/Shaft Deutsche (Germany)
Good Import S.A. (Morocco)

Notes:

(1) The Goodyear Tire & Rubber Company has no parent or controlling shareholder(s).

(2) For the purposes of this list, joint venture companies where Goodyear exercises some management control have been included, even though Goodyear does not own more than 50% of the voting stock.

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No. 88-1256

IN THE

Supreme Court of the United States

October Term, 1988

BENNY PELLIGRA,
Petitioner,

vs.

THE GOODYEAR TIRE & RUBBER COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF OHIO
FOR THE NINTH APPELLATE DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In late 1984, Goodyear management concluded that there were too many employees on the Goodyear payroll. When it became apparent that a large number of salaried workers would have to be involuntarily terminated, it was unofficially suggested that preliminary research be

conducted to determine the feasibility of a voluntary Separation Program. Such a program, it was hoped, if adopted by management, would have the effect of securing the voluntary resignation and/or retirement of enough Goodyear employees that involuntary layoffs/terminations would be rendered unnecessary.

Terry Deems, Manager of Compensation, Benefits & Personnel Policy, was approached in December of 1984 by his boss on this subject. Mr. Deems was asked to compile data and to research various options which might be presented to Goodyear management. Over the next several months, plans were studied, costs were estimated, projections were made and recommendations were offered about potential programs. The necessary information was gathered by Terry Deems and he ultimately arranged and submitted three separate options for consideration by Goodyear management.

Although Mr. Deems had compiled the data and prepared the various programs that management considered, the decisions as to whether there would be a program and the form the program would actually take was entirely a function of Goodyear's upper management and was completely beyond Mr. Deems' assignment and authority.

Benny Pelligra, an employee of the International division, had returned to Akron from an assignment in Australia on Sunday, May 12, 1985. May 13, 1985 was his first day back in the Akron offices. Upon returning to Akron, Mr. Pelligra heard rumors circulating that Goodyear was about to offer some type of "retirement compensation." On either Tuesday, May 14, 1985, or Wednesday, May 15, 1985, Mr. Pelligra phoned Terry Deems. According to Mr. Deems, the phone call focused on the numerous rumors circulating throughout the

company. He acknowledged to Pelligra that he heard the same rumors. In response to a question as to whether Goodyear was going to actually do something, he replied that as far as he knew nothing had been officially approved.

On May 16, 1985, a day or two after the phone call, Pelligra went to the Goodyear personnel office and signed his application for his pension. One day later, Tom Barrett, President and Chief Executive Officer of The Goodyear Tire & Rubber Company, announced that a voluntary "Special Separation Program" was being offered to certain employees, first in the Finance Division and then, if approved by officers of the other divisions of the Company, in those divisions. On June 21, it was announced that the voluntary program would be offered to certain Goodyear International Division personnel. Employees who had applied for retirement pensions prior to the date on which the plan was offered were ineligible to participate in the program. Because Mr. Pelligra applied for his pension on May 16, 1985, he was ineligible.

Pelligra filed an action in the Court of Common Pleas of Summit County, Ohio against The Goodyear Tire & Rubber Company and Goodyear International Corporation, in January of 1986. He alleged breach of contract, negligent misrepresentation and fraud.

In December of 1986, Defendants moved for summary judgment raising preemption of all state law causes of action by virtue of ERISA. The Court overruled Goodyear's motion on January 8, 1987.

Goodyear later refiled its Motion for Summary Judgment and asked the Court to reconsider its earlier Order in light of this Court's decisions in *Pilot Life v. Dedeaux*, _____ U.S. _____, 107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987) and *Metropolitan Life v. Taylor*, 55 U.S.L.W. 4468 (April 6, 1987). The Court again overruled Defendants' Motion for Summary Judgment.

On December 7, 1987 this matter proceeded to jury trial on the common law theories of breach of contract, negligent misrepresentation and fraud. The trial court dismissed the claim of breach of contract at the close of all the evidence. The jury returned (6-2) a verdict in favor of the Petitioner in the amount of $57,500.00. In response to a specific interrogatory, the jury found (8-0) that there had been no fraud on the part of Goodyear.

Goodyear filed its notice of appeal. On June 29, 1988, the Court of Appeals, Ninth Judicial District, determined the Plaintiff's state law causes of action were preempted by ERISA and, on that basis, reversed the judgment of the trial court. Plaintiff then sought review of the Appellate Court decision by the State Supreme Court. The Ohio Supreme Court, upon consideration of the parties' memoranda, refused to exercise its jurisdiction and declined to review the Appellate Court's decision.

SUMMARY OF THE ARGUMENT

The state appellate court was correct in determining that Goodyear's voluntary Separation Program was governed by the provisions of ERISA, 29 U.S.C. §1144(a). As Petitioner's common law causes of action for breach of contract, negligent misrepresentation and fraud were "related to" the program, the state court was correct in finding those causes of action to be preempted by ERISA.

This Court's decision in *Pilot Life v. Dedeaux*, _____ U.S. _____, 107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987) confirmed the expansive sweep of the statute and subsequent cases interpreting *Pilot Life* fully support the state court's interpretation in this matter. Petitioner's reliance upon this Court's decision in *Ft. Halifax Packing Company, Inc. v. Coyne, Director of the Bureau of Labor Standards of Maine*, _____ U.S. _____, 107 S. Ct. 2211, 96 L. Ed. 2d 1 (1987) is misplaced in that the Goodyear plan involved indicia of administrative responsibilities absent in *Ft. Halifax, supra.*

Because Respondent Goodyear has established a bona fide employee benefit plan, the state appellate court properly found all state law claims related to it to be preempted. As this case presents nothing more than rudimentary principles of preemption which have been previously settled by this Court, and because the decision of the Ninth Appellate Judicial District only upholds the integrity of ERISA, review on *certiorari* is unwarranted.

REASON WHY THE PETITION SHOULD BE DENIED

THE STATE COURT CORRECTLY DECIDED THAT PETITIONER'S COMMON LAW CAUSES OF ACTION WERE SUBJECT TO AND PREEMPTED BY ERISA.

The state appellate court correctly construed the preemption provision of 29 U.S.C. §1144(a) to apply to Goodyear's voluntary Special Separation Program and accordingly found the common law causes of action "related to" the program to be preempted by ERISA. "Employee benefit plan" is defined by the statute as either an "employee welfare plan" or an "employee pension plan." 29 U.S.C. §1002(3). Notwithstanding Petitioner's contentions to the contrary, severance benefit plans such as the voluntary Separation Program in question have been recognized as employee welfare benefit plans within the meaning of ERISA, 29 U.S.C. §1002(1). *See, Holland v. Burlington Industries,* 772 F.2d 140 (4th Cir. 1985), *aff'd* 91 L. Ed. 2d 559 (1986); *Gilbert v. Burlington Industries,* 765 F.2d 320 (2d Cir. 1985), *aff'd* 91 L. Ed. 2d 558 (1986); *Blakeman v. Mead Containers,* 779 F.2d 116 (6th Cir. 1985). Because Goodyear's program falls within the parameters of an "employee benefit plan," ERISA preempts all state law claims "related to" it.

This Court has settled any doubt about the breadth of ERISA preemption in its decision in *Pilot Life v. Dedeaux,* _____ U.S. _____, 107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987). In *Pilot Life,* the plaintiff's suit against his former employer's insurance company contained the state causes of action of tortious breach of contract, breach of fiduciary duty and fraud in the inducement (not unlike those alleged by the Petitioner herein). Like the Petitioner, Dedeaux did not assert any of the causes

of action provided by ERISA. This Court examined the legislative history of ERISA and found that Congress intended the remedies set forth in Section 502(a) of the Act to be the exclusive civil enforcement scheme for claims for benefits under an employee benefit plan. The Court concluded that the preemption clause found at Section 514(a) of the Act has an expansive sweep and that the remedies set forth in Section 502(a) are exclusive. Thus, the Court held that *any* state law cause of action which "relates to" an employee benefit plan falls under Section 514(a) and is preempted.

Petitioner cites *Ft. Halifax, supra,* in support of his position that the Goodyear program in which he desired to participate is not a "plan" within the meaning of the federal statute. However, the program adopted by Goodyear in May of 1985 was more than the statutory edict which had been the subject of the *Ft. Halifax* decision. After significant planning and due consideration to all of the relevant data, Goodyear made the decision to offer a plan in hopes of avoiding massive involuntary layoffs. The testimony of Mr. Deems regarding the compilation of data and the research which was involved in the preparation and submission of his reports to management was uncontroverted. The plan was not offered to all Goodyear divisions, or departments, or job classifications. Goodyear exercised discretion in terms of which divisions, departments and job classifications were entitled to participate in the plan. Employees were free to opt for, or against, participation. Even after an employee opted to participate, there was no guarantee that his offer to participate would be accepted. The record below clearly established the administrative activity which attended the plan. The facts also clearly distinguish the case *sub judice* from *Ft. Halifax, supra,* where, by force of state statute, employees were automatically eligible to receive

one week's severance pay from any employer who relocated or terminated an employment facility. Goodyear, on the other hand, retained the administrative responsibilities this Court found to be indicative of an employee benefit plan:

> These statements reflect recognition of the administrative realities of employee benefit plans. An employer that makes a commitment systematically to pay certain benefits undertakes a host of obligations, such as determining the eligibility of claimants, calculating benefit levels, making disbursements, monitoring the availability of funds for benefit payments, and keeping appropriate records in order to comply with applicable reporting requirements.

Ft. Halifax, supra at 55 L.W. p. 4701.

Unlike *Ft. Halifax*, Goodyear first had to determine what form the plan would take and what the benefits would be. This was a discretionary process which involved top management's best business judgment given the data that was prepared and submitted by middle management. Once having decided that there would be a plan and the form the plan would take, Goodyear had to determine the individual eligibility of each applicant and each applicant's benefit had to be calculated based upon his yearly salary.

Petitioner stresses the "single payment" aspect of Goodyear's retirement incentive plan and reads this Court's holding in *Ft. Halifax* to be more restrictive than Respondent believes the Court intended. Admittedly, Goodyear's payment of benefits was to be made in a lump sum, so that systematic payments were not anticipated. In *Ft. Halifax*, however, this Court, did not hold any scheme calling for a single payment to be outside the preemptive scope of ERISA. Nor does this purely quantitative argument which is advanced by

Petitioner find support in the federal court decisions which have considered the question since *Ft. Halifax* was announced. In *Schwartz v. Newsweek*, 827 F.2d 879 (2d Cir. 1987), employees at *Inside Sports* (a monthly magazine begun by Newsweek) heard rumors of financial difficulties of the publication and learned that Newsweek was attempting to sell *Inside Sports* to Active Market, Inc. Employees of *Inside Sports* were invited to apply for employment with Active Markets. The proposed severance arrangements were as follows:

> Those accepting employment with Active Markets would not be eligible for severance pay from Newsweek, unless their employment with Active Markets terminated within three months of their hiring date. Employees who did not wish to join Active Markets and who also failed to obtain other suitable positions at Newsweek would be terminated and given severance pay.

Schwartz, supra at pp. 880-881.

The three employees who opted to work for Active Markets left Newsweek without receiving severance pay. After nine months in their new positions at Active Markets, production of *Inside Sports* was halted and Active Markets declared bankruptcy. The employees were terminated with two weeks severance pay from Active Markets. Thereafter the employees demanded severance pay from Newsweek. When Newsweek denied their request, they sued in U.S. District Court in the Southern District of New York claiming alternatively ERISA violations and various state common law theories.[1] Newsweek's motion for summary judgment

[1] Petitioner has asserted in his petition at p. 15 that the state court's decision leaves him without a remedy. Respondent would point out that Pelligra had ample opportunity up to, and including, trial of this matter to amend his complaint to include an alternative claim under ERISA as did the plaintiffs in *Schwartz*. For reasons known only to him, Petitioner refused to do so.

was granted in its entirety by the district court. The employees pursued only the ERISA claim on appeal. The Second Circuit found the unfunded severance pay policy, which the parties agreed constituted an "employee welfare benefit plan" within the meaning of ERISA, to not have been arbitrary or capricious. See also *Northern Group Service v. Auto Owners Ins. Co.*, 833 F.2d 85, 89 (6th Cir. 1987) in which the Sixth Circuit distinguished *Ft. Halifax* and found Michigan state law to "relate to" an established benefit plan.

Clearly *Ft. Halifax* was concerned with a situation where there was no plan structured by an employer and no discretion on the part of the employer as to which employees should participate in benefits. The instant case is distinguishable on these important respects.

Considering the importance of the statutory scheme and ERISA's overall objective, it appears illogical that the question of whether a plan is governed by ERISA should rest on a purely quantitative basis, i.e., whether the benefit is paid in a single, lump sum or in multiple payments over a period of time. Such a result minimizes the uniformity which ERISA seeks to establish for both employees and employers. Moreover, such a distinction, based upon mere number, puts employers and the courts in the position of having to determine when an administrative scheme is truly "ongoing". In other words, had Goodyear elected to pay the special separation benefits in *two* equal installments six months apart, would this same scheme under Petitioner's rationale then be deemed a "plan" within the meaning of ERISA? Certainly, the Supreme Court's decision in *Ft. Halifax* neither supports this proposition nor intends this result.

CONCLUSION

It is respectfully submitted that the voluntary Separation Program offered by Goodyear in 1985 is an "employee benefit plan" within the meaning of ERISA and that, therefore, ERISA preempts all state law claims. Thus, the state appellate court quite properly construed 29 U.S.C. §1144(a).

Goodyear readily concedes that matters touching upon employee benefit plans are of great interest and concern not only to employers and employees in the State of Ohio but to employers and employees throughout the United States. It is, in fact, this great interest that prompted the Congress of the United States to enact the legislation known as ERISA. Nevertheless, this particular controversy hardly merits the attention of this Court. Most recently in *Pilot Life, supra*, this Court addressed itself to the issue of preemption. The principles enunciated there are clearly applicable to this case and have been universally applied by federal courts. Further, federal court cases decided since *Ft. Halifax* indicate that this case was correctly decided by the state appellate court. There is nothing about the facts or the history of this case that mandates a review or revision of the principles that have been established by the Supreme Court of the United States, the Supreme Court of Ohio, and lower federal courts. Moreover, this State Appellate decision neither carves exceptions from this Court's prior rulings nor imposes limitations upon those rulings. Rather the decision of the Ninth Appellate Judicial District upholds the integrity of ERISA and underscores the uniformity which is at the core of the ERISA statute and this Court's prior decisions.

Plaintiff argues that if the state appellate court's decision is allowed to stand, he is left without a remedy. This argument, while having a certain populist appeal, lacks an intellectual foundation. Plaintiff had every opportunity to pursue the remedies provided under ERISA. He was well aware of all of the motions that were made by Goodyear in which Goodyear urged the Court to limit the Plaintiff's remedy to that provided by ERISA. Yet, Plaintiff, at all times, consciously eschewed the opportunity to amend his Complaint to seek, in the alternative, remedies provided by ERISA. Plaintiff voluntarily decided that he would not, because he could not, attempt to prove that Goodyear had acted arbitrarily and capriciously in refusing to allow him to participate in the voluntary Separation Program.

In sum, this case involves nothing more than rudimentary principles of preemption that have been recently examined by this Court. There is, therefore, no need for this Court to review this case on *certiorari*.

Respectfully submitted,

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